

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

SMITH

Plaintiff,

vs.

JONES

Defendant.

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**PLAINTIFF SMITH'S MOTION FOR SUMMARY ADJUDICATION**

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Plaintiff hereby moves the court for an order of summary adjudication against Defendant on the issue of liability for fraud. This motion is based upon the Declaration of Smith, the Declaration Smith's attorney, Able, the Memorandum of Authorities and the records and files herein.

A. Description of claims and issues to which summary adjudication is warranted.

Plaintiff requests that this court issue summary adjudication, on the following elements regarding Plaintiff's claim of fraud against Defendant. On these elements the Plaintiff has the burden of proof by a preponderance of the evidence.

1. Defendant made a representation of an existing fact;
2. Its materiality;
3. Its falsity;
4. The Defendant's knowledge of its falsity or ignorance of its truth;
5. The Defendant's intent that it should be acted on by Plaintiff;

6. Plaintiff's ignorance of its falsity;
7. Plaintiff's reliance on the truth of the representation; and
8. Plaintiff's right to rely on Defendant's representation.

B. Facts that are not genuinely in dispute.

1. Representation of existing, fact. On January 15, 1992, Defendant represented to Plaintiff that Defendant's property contained six (6) acres and had passed a "perc test."

(Declaration of Smith, page 2, paragraph 1.)

2. Materiality. These representations were important because Plaintiff intended to subdivide the property into six one-acre residential building sites. (Declaration of Smith, page 2, paragraph 2.)

3. Falsity. In fact, the property was four acres, not six acres, (Survey of Fox, attached as Exhibit A to the Declaration of Attorney Able and the property had not passed any "perc test." (Letter from City of Tacoma Health Department, dated April 15, 1992, Exhibit B to the Declaration of Attorney.)

4. Defendant's knowledge. Defendant knew this representation was false because she had a prior survey of the property (Answer to Interrogatory No. 15, Exhibit C to Declaration of Attorney Able and had never obtained a "perc test" on the property. (Deposition of page 25, lines 14-18, Exhibit E to Declaration of Attorney Able.)

5. Defendant's intent that her representation should be acted on. Defendant Jones knew that Plaintiff Smith wanted to purchase the property for purposes of building six one-acre homes. (Declaration Plaintiff Jones, page 3, paragraph 4.)

6. Plaintiff's ignorance of its falsity. Plaintiff Smith did not know that Defendant's representations were false. (Declaration of Smith, page 3, paragraph 3.)

7. Reliance. Plaintiff Smith purchased the property from Defendant Jones for \$200,000 in reliance on Defendant Jones' representation. (Declaration of Smith, page 4, paragraph 1.)

8.     Right to Rely. Plaintiff Smith had a right to rely on this representation because he had no reason to believe that Defendant Jones was misrepresenting any of the facts regarding the property. (Declaration of Smith, page 4, paragraph 2.)

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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Andrew Able  
Law Offices of Andrew Able  
Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT  
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**DEFENDANT JONES' RESPONSE TO PLAINTIFF'S MOTION  
FOR SUMMARY ADJUDICATION**

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Defendant requests that the court grant summary adjudication on some of the issues presented and deny Plaintiff's motion for summary adjudication on other of the issues presented. This response is based upon the Declaration of Jones, the Declaration of Jones' attorney, Baker, the Memorandum of Authorities and the records and files herein.

A. Description of claims and issues to which summary adjudication is warranted.

Defendant agrees that this court should issue summary adjudication on the following elements regarding Plaintiff's claim of fraud against Defendant:

1. Defendant made a representation of an existing fact;
2. Its falsity;

B. Description of claims and issues to which summary adjudication is not warranted.

Defendant requests that this court not issue summary adjudication on the following elements regarding Plaintiff's claim of fraud against Defendant:

1. The materiality of the fact;
2. The Defendant's knowledge of its falsity or ignorance of its truth;
3. The Defendant's intent that it should be acted on by Plaintiff;
4. Plaintiff's ignorance of its falsity;
5. Plaintiff's reliance on the truth of the representation; and
6. Plaintiff's right to rely on Defendant's representation.

C. Response to Plaintiff's facts.

1. Representation of existing fact. On January 15, 1992, Defendant represented to Plaintiff that Defendant's property contained approximately six acres and had passed a "perc test."

2. Materiality. These representations were not important because the Defendant did not know the Plaintiff intended to develop the property. (Declaration of Jones, page 2, paragraph 1.)

3. Falsity. Defendant admits the facts were not accurate.

4. Defendant's knowledge. Defendant did not know that the representations were false. Although Defendant Jones had a prior survey of the property, this survey did not indicate the amount of property and Defendant Jones is not trained in surveying, so was unable to determine the actual acreage she owned. (Declaration of Jones, page 2, paragraph 4.) Additionally, Defendant believed that a "perc test" had been performed on the property by a prior owner. (Declaration of Jones, page 3, paragraph 1.)

5. Defendant's intent that her representation should be acted on. At no time did Defendant Jones expect that Plaintiff Smith would rely on her statements. In fact, Defendant encouraged Plaintiff to get his own survey and to do a perc test. (Declaration of Jones, page 4, paragraph 1.)

6. Plaintiff's ignorance of its falsity. When Plaintiff Smith examined the property, the property lines were clearly marked and it was obvious to anyone who measured the property that the true acreage was less than six acres. (Declaration of Jones, page 4, paragraph 4.) Additionally, copies of Defendant's previous survey were provided to Plaintiff prior to closing.

(Deposition of Smith, page 60, lines 14-24, Exhibit A to the Declaration of Baker.)

7.     Reliance. Plaintiff Smith did not rely on Defendant's representation because he had the previous survey which confirmed the true acreage of the property. (Declaration of Jones, page 4, paragraph 4.)

8.     Right to rely. Plaintiff Smith had no right to rely on this representation because he was fully capable of observing the property he was buying and had access to a survey which showed the true acreage. Additionally, if he was concerned about the "perc test," he could have done one himself. (Declaration of Jones, page 4, paragraph 3.)

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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Betty Baker  
Law Offices of Betty Baker  
Attorneys for Defendant

**IN THE UNITED STATES DISTRICT COURT  
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**ORDER RE: MOTION FOR SUMMARY ADJUDICATION**

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The court having reviewed Plaintiff's motion for summary adjudication, including the Motion, the Declaration of Smith, the Declaration of Able and the Memorandum of Authorities in support thereof, and having considered the Response to the Motion for Summary Adjudication, including the Declaration of Jones, the Declaration of Baker and the Memorandum of Authorities in opposition thereto, the court hereby enters the following order.

Summary adjudication is ordered on the following issues:

1. Defendant Jones made representations of two existing facts: (1) that her property contained six acres and (2) that her property had passed a "perc test."
2. These representations were material.
3. These representations were false.

4. Defendant Jones knew or should have known that her representations would be acted on.

5. Plaintiff's purchased the property from Defendant Jones in reliance on Defendant Jones' representation.

Plaintiff's Motion for Summary Adjudication is DENIED because facts are genuinely in dispute on the following claims:

1. Defendant's knowledge.
2. Plaintiff's ignorance of the falsity of the representations.
3. Whether Plaintiff Jones had a right to rely.

DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

BY THE COURT:

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United States District Court Judge